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Bard Peripheral Vascular, Inc.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability  
Litigation,

No. 2:15-MD-02641-DGC

**DEFENDANTS' UNOPPOSED  
MOTION AND INCORPORATED  
MEMORANDUM TO SEAL**

Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively “Bard”) hereby respectfully move this Court for an order, pursuant to the Stipulated Protective Order (Doc. 268), Federal Rule of Civil Procedure 26(c)(1)(G), and Local Civil Rule 5.6 sealing a document accompanying Defendants’ Reply in Support of Their Motion for Protective Order Regarding Discovery of Litigation Consultant’s Report. The exhibit that is the subject of Bard’s Unopposed Motion to Seal constitutes trade secrets or other confidential research, development, or commercial information thereby warranting protection from public disclosure for a discovery related motion. Although the plaintiffs do not oppose the sealing of this document for purposes of expeditiously resolving Bard’s Motion for Protective Order, the plaintiffs explicitly reserve their right to challenge the

1 confidentiality designation of Bard's document at a later time pursuant to the terms in the  
 2 Stipulated Protective Order. Accordingly, there is good cause to grant Bard's Unopposed  
 3 Motion to Seal.

#### 4 **ARGUMENT AND CITATION OF AUTHORITY**

5 In conjunction with Bard's Reply in Support of Its Motion for Protective Order  
 6 regarding Dr. Lehmann's December 15, 2004, report, Bard wishes to submit the following  
 7 confidential document to the Court for its consideration: an April 24, 2004 Health Hazard  
 8 Evaluation (BPV-17-01-00153179), attached as Exhibit A, regarding adverse event  
 9 reporting, investigation, and analysis ("Document at Issue"). Similar to other documents  
 10 that the Court has sealed in conjunction with Bard's Motion for Protective Order, the  
 11 Document at Issue reflects Bard's confidential trade secrets and/or contain highly  
 12 competitive, confidential, or proprietary information that warrants protection under  
 13 Federal Rule of Civil Procedure 26(c)(1)(G) because the document is not made public by  
 14 Bard and, if obtained by Bard's competitors, would give an unfair economic advantage to  
 15 those competitors.

#### 16 **A. Bard Asserts that the Document At Issue Is "Confidential Information"** 17 **Pursuant to the Stipulation for Protective Order, and Therefore It Should Be** 18 **Sealed**

19 The Court has entered a Stipulated Protective Order to protect public disclosure of  
 20 "Confidential Information," which includes any "'trade secret' or other confidential  
 21 research, development, or commercial information' that is suitable for protection under  
 22 Federal Rule of Civil Procedure 26(c)(1)(G)" Stipulated Protective Order (Doc. 269 ¶¶ 1,  
 23 2.) Bard has designated the Document at Issue in this motion as "CONFIDENTIAL." (*Id.*  
 24 ¶ 6). Finally, the Stipulated Protective Order states "All Confidential Information shall be  
 25 used for the purpose of this lawsuit only . . . except as permitted by this Order." (*Id.* ¶ 12).  
 26 These types of provisions are common in legal proceedings and are routinely enforced.  
 27 *See, e.g., Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 307 (N.D. Ill. 1993)  
 28 ("We hold that confidential information obtained by Culinary in this litigation may not be

disseminated to litigants in other cases against Raychem.”); *cf Smithkline Beecham Corp. v. Synthon Pharmaceuticals Ltd.*, 210 F.R.D. 163, 169 (M.D.N.C. 2002) (refusing to modify protective order to allow plaintiffs to use confidential documents in other litigation). Thus, the Court should grant Bard’s Unopposed Motion to Seal to maintain the confidentiality afforded by the Stipulated Protective Order to the Document at Issue.

**B. The Document at Issue Warrants Protection Pursuant to Fed. R. Civ. P. 26(c)(1)(G) as a Trade Secret or Other Confidential Research, Development or Commercial Information, and Would Cause Bard Competitive Harm if Made Public**

Federal Rule of Civil Procedure 26(c)(1)(G) provides that the Court may, for good cause, “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (G) requiring that a trade secret or other confidential research, development, or commercial information . . . be revealed only in a specified way.” “Good cause” exists when disclosure will result in “a clearly defined and serious injury to the party” seeking closure. *Blanchard & Co., Inc. v. Barrick Gold Corp.*, No. 02-3721, 2004 WL 737485, at \*5 (E.D. La. Apr. 5, 2004) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). In determining whether “good cause” exists, the court “must balance the requesting party’s need for information against the injury that might result if uncontrolled disclosure is compelled.” *Id.* The Court has wide discretion in determining the scope of an order protecting confidential research, development, or commercial information. *See id.*

The information contained in the Document at Issue includes confidential business information, and is correspondence concerning Bard’s complaint handling processes, quality control and quality system procedures, and device tracking methods. *See Carr Aff.* ¶ 8.b, Aug. 28, 2014, attached as Exhibit B.<sup>1</sup> The Document at Issue represents the implementation of these processes, procedures, and policies, which Bard has in part

<sup>1</sup> Mr. Carr’s affidavit was executed in relation to a motion to seal in a related case against Bard and dealt with some of the same documents at issue here. To the extent that the Court would like additional information regarding individual Document at Issue, Bard will supplement the record.

1 developed to comply with the technical requirements provided for by the FDA and/or  
2 Bard's internal requirements. *See id.*

3 The form and presentation of the information contained in the Document at Issue  
4 took years for Bard to develop. *See id.* ¶ 8.d. Given the time and money that Bard has  
5 invested in developing its evaluative and investigative processes, as well as its processes  
6 for regulatory and internal policy compliance, competitor medical device companies  
7 would gain an unfair economic advantage if they gained access to Bard's commercial  
8 information, thereby causing Bard real and tangible harm in the highly competitive  
9 medical device industry. *See Carr Aff.* ¶ 10.<sup>2</sup> Moreover, because of the economic injury  
10 that Bard would sustain if its internal documents were available to competitors, Bard  
11 seeks to protect the confidentiality of material like the Document at Issue whenever its  
12 internal documents are at issue in litigation.<sup>3</sup> *See id.* ¶ 11.

13  
14 <sup>2</sup> *See e.g., Medicis Pharm. Corp. v. Acella Pharm., LLC*, CV 10-1780-PHX-JAT, 2012  
15 WL 2260928 at \*2 (D. Ariz. June 15, 2012) (sealing exhibits related to "Medicis'  
16 marketing strategy, Acella's product formulation, . . . various emails and deposition  
17 transcripts, viscosity test data, sales and marketing information, and various other  
18 documents" because "[m]uch of this information has been previously sealed by the Court,  
19 has been designated as confidential by the parties pursuant to the protective order in this  
20 case, or could otherwise potentially harm the parties if released publicly because of its  
21 confidential and sensitive nature."); *see also, e.g., In re Denture Cream Products Liab.*  
22 *Litig.*, 09-2051-MD, 2013 WL 214672 (S.D. Fla. Jan. 18, 2013) (sealing internal company  
23 documents because the "common law right of access to judicial proceedings does not  
24 apply under the facts of this case" the document at issue implicated hundreds of employee  
25 hours of work, costs hundreds of thousands of dollars to plan, implement and analyze,  
26 have substantial commercial value and are of substantial value to other denture adhesive  
27 manufacturers."); *In re Eli Lilly & Co., Prozac Prods. Liab. Litig.*, 142 F.R.D. 454, 460  
28 (S.D. Ind. 1992) (holding pharmaceutical company would suffer harm if the  
manufacturing process it has expended time and money developing became known to  
competitors); *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 305 *order*  
*clarified*, 153 F.R.D. 614 (N.D. Ill. 1993) ("[D]isclosing Raychem's product design  
modification and changes would decrease Raychem's incentive to invest in safety devices.  
Raychem's competitors would get free access to information which Raychem has spent a  
great deal of time and money producing and protecting"); *In re Gabapentin Patent*  
*Litigation*, 312 F. Supp. 2d 653, 659 (D.N.J. 2004) (noting the pharmaceutical industry is  
highly competitive and granted protective order); *see also, e.g., Davis v. AT&T*, 1998 WL  
912012 (W.D.N.Y. 1998) (noting the market for automatic speech recognition technology  
is highly competitive and rises to the level of the court's protection).

<sup>3</sup> Therefore, Bard has taken reasonable efforts to maintain confidentiality of its document  
and it should remain confidential. *See In re Denture Cream Products Liab. Litig.*, 09-  
2051-MD, 2013 WL 214672 (S.D. Fla. Jan. 18, 2013) (finding documents confidential in  
part because the defendant "consistently treated the information as closely guarded  
secrets").

1 Finally, because the Document at Issue does not relate to a motion that requires  
 2 judicial resolution of this case on the merits, there is no general First Amendment right to  
 3 access the Document. *See, e.g., Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d  
 4 1304, 1312–13 (11th Cir. 2001) (finding that “material filed with discovery motions is not  
 5 subject to the common-law right of access, whereas discovery material filed in connection  
 6 with pretrial motions that require judicial resolution of the merits is subject to the  
 7 common-law right”); *United States v. Wolfson*, 55 F.3d 58, 61 (2d Cir. 1995) (“We are not  
 8 aware . . . of any common-law principle that documents submitted to a court in camera for  
 9 the sole purpose of confirming that the refusal to disclose them to another party was  
 10 proper, are to be deemed judicial records open to the public.”); *The Courier-Journal v.*  
 11 *Marshall*, 828 F.2d 361, 363 (6th Cir. 1987) (newspapers had no first amendment right of  
 12 access to discovery materials, despite the recognition that “proceedings [were] of intense  
 13 public concern”).

14 For each of these reasons, Bard has met the good cause standard for protection of  
 15 its Document at Issue by showing that public disclosure of the Document will cause a  
 16 clearly defined injury to Bard. *See Shell Exploration & Prod. Co. v. Robinson*, No.  
 17 CIV.A. 01-1417, 2001 WL 1490954 (E.D. La. Nov. 20, 2001) (finding that good cause  
 18 existed for sealing judicial record “out of an abundance of caution in order to protect trade  
 19 secrets” even when the testimony at issue “would not be particularly illuminating,” the  
 20 “testimony did not specify any particular trade secrets”). Accordingly, the Court should  
 21 grant Bard’s Unopposed Motion to Seal.

## 22 CONCLUSION

23 For the foregoing reasons, the Document at Issue warrants protection as  
 24 confidential research, development, or commercial information pursuant to Rule  
 25 26(c)(1)(G). Accordingly, the Court should grant Bard’s Unopposed Motion to Seal.

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1 DATED this 8th day of January, 2016.

2 SNELL & WILMER L.L.P.

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17 Peripheral Vascular, Inc.

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on January 8, 2016, the foregoing was electronically filed with  
20 the Clerk of Court using the CM/ECF system which will automatically send email  
21 notification of such filing to all attorneys of record.

22 s/Amanda C. Sheridan

23 23283276

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